United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7339
75-7350

To be argued by:
IRVING B. BUSHLOW

United States Court of Appeals

FOR THE SECOND CIRCUIT

MICHAEL CASTELLANO,

Plaintiff-Appellee,

v.

RUDOLF A. OETKER, "POLARSTEIN",

Defendant-Appellee-Appellant.

RUDOLF OETKER,

Third Party Plaintiff-Appellee-Appellant,

v.

BAY RIDGE OPERATING CO. INC., and STANDARD FRUIT & STEAMSHIP CO.,

Third Party Defendants-Appellants,

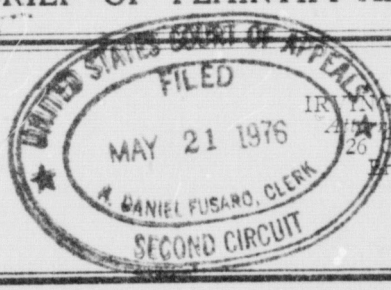
STANDARD FRUIT & STEAMSHIP CO.,

Third Party Defendant-Appellant,

(& in 75-7350).

On Appeal from the United States District Court For the Eastern District of New York

BRIEF OF PLAINTIFF-APPELLEE



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BRIEF OF PLAINTIFF-APPELLEE

Statement

Plaintiff, a longshorman, brought an action against Rudolf A. Oetker, the shipowner to recover damages for

personal injuries by reason of the negligence of the shipowner and the unseaworthiness of the vessel, S.S. POLARSTEIN. The shipowner impleaded Bay Ridge Operating Co., Inc., the stevedore and Standard Fruit & Steamship Co., the owner of the conveyors involved in the accident.

Plaintiff's principal proof at trial as to negligence was that an improper method of work was employed by the longshoreman, in that there were insufficient longshoremen assigned to the conveyors to operate the controls and turn the boxes of bananas around the corners where the conveyors met the rollers. This method was employed all day and a ship's mate visited the hatch at least twice during the day, noticed the lack of men and did nothing about it. Plaintiff also claimed that the side rails on the conveyors were inadequate to hold the larger boxes of bananas and that no safety nets were used and that the longshoremen were not wearing safety hats.

At the time of the accident the longshoremen were working in the lower hold, "D" deck, and from that level, a conveyor ran to the lower tween deck "C" deck, where it met a roller conveyor which carried the boxes of bananas to the next conveyor which ran from that level to the upper tween deck, "B" deck. From that point, a third conveyor ran to the main deck, "A" deck. Where each of the conveyors met, it was necessary to turn the boxes of bananas around the corner by means of stationary rollers in order for them to be lifted by the next conveyor. There were controls at the bottom of each conveyor.

The side rails of the conveyors were three to four inches high and these same conveyors had been in use for years. About six months before the accident a new type of banana box was introduced. It was about four inches higher than the old boxes and shorter. No changes were made in the side rails to accommodate the higher box.

Plaintiff was disconnecting part of a conveyor on "D" deck when he was struck on the head by a box of bananas weighing about 40 pounds which fell from the conveyor between "A" and "B" decks.

Plaintiff's proof as to unseaworthiness was essentially the same as the proof of negligence: one, the side guards on the conveyors were unsafe and inadequate when larger boxes of bananas were being discharged; two, there were no safety nets rigged under each level of the conveyors to protect the men working at a lower level; three, there was an unsafe method of discharge employed because there were insufficient longshoremen being used to operate the conveyors, and four, that the longshoremen were not wearing hard hats.

This brief will not deal with damages or the medical issues, since appellant-Standard has not raised the issue of excessiveness in its brief. Plaintiff will also not deal with the issues of indemnity and contribution which issues are limited solely to the shipowner, the stevedore and Standard. Plaintiff will merely defend the verdict in favor of the plaintiff against the shipowner.

The trial court submitted the issues to the jury on a Special Verdict form (235-236a) in which the jury answered each question in the affirmative. The jury also returned a verdict for plaintiff in the amount of $75,000. The trial court decided the indemnity and cross-claims in an opinion (237a-244a) and judgment was entered accordingly (245-247a).

Appeals were taken by each of the parties, except the plaintiff.

POINT I

The Trial Court properly denied the motions for judgment N.O.V. in regard to the verdict in favor of plaintiff against the shipowner.

Plaintiff's claims against the shipowner have been previously outlined and there was sufficient evidence to allow these claims to go to the jury.

It is settled law that on a motion for judgment notwithstanding the verdict or for a new trial, the test to be applied by the trial court is whether, after viewing the evidence in a light most favorable to the plaintiff, reasonable men could not find for the plaintiff. *Fortunato* v. *Ford Motor Co.*, 464 F.2d 962, 965 (2 Cir.), cert den 409 U.S. 1038 (1972); *Compton* v. *Luckenbach Overseas Corp.*, 425 F. 2d 1130, 1132 (2 Cir.), cert. den. 400 U.S. 916 (1970); *Armstrong* v. *Commerce Tankers Corp.*, 423 F.2d 957, 959 (2 Cir.), cert. den. 400 U.S. 833 (1970).

The trial court should ". . . abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result." *Compton,* supra, 425 F.2d at p. 1133.

The trial court properly denied the motions and its decision is not reversible unless it was an abuse of discretion. Appellant, Standard has not shown any such abuse and the verdict for plaintiff should be sustained.

POINT II

Plaintiff is entitled to recover for the negligence of the shipowner.

A shipowner is under a duty to exercise reasonable care for the safety of the longshoremen discharging its vessel and to provide the longshoremen with safe equipment and appliances and a safe place in which to work. *Mahnich* v. *Southern SS Co.*, 321 U.S. 96 (1944). A shipowner is liable for the negligent acts of its officers, agents, servants or employees performed during the course of their employment aboard the vessel. *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960).

The shipowner allowed plaintiff and the other longshoremen to work in the lower hold of the vessel while an unsafe method of discharging cargo was being used (there was an insufficient number of men to safely perform the work) and at the same time the vessel failed to require the men to wear protective head gear. Discharge was allowed to proceed even though the ship's officers knew of these conditions, and that the side rails of the conveyors were not high enough to hold the larger boxes of bananas. As a result, the vessel's officers were negligent in failing to provide plaintiff with a safe place to work. The shipowner also knew that safety nets were not used, or in place, on the day of the accident to catch any falling boxes before they hit the men working below.

The shipowner thus breached its duty to provide the longshoremen with a safe place to work, giving rise to a cause of action based on negligence to which the defenses of contributory negligence and assumption of risk are not a bar. Under the standard set by the United States Supreme Court, liability may be imposed upon a shipowner whenever the negligence of the shipowner or

crew member "played any part *even the slightest* in producing the injury . . . . for which damages are sought." (emphasis supplied). *Ferguson* v. *Moore McCormack Lines,* 352 U.S. 521; *Rogers* v. *Missouri Pacific Railway,* 352 U.S. 500 (1957).

In *Adams* v. *United States,* 393 F2d 903, 905 (9 Cir. 1958), the fact finder found that there was an insufficient number of longshoremen to safely do the work and the Court of Appeals held that this constituted unseaworthiness, without reaching the negligence claim. In the instant case, the fact that the vessel's officers had actual notice of the practice would be a basis for holding the vessel negligent.

In *Ferrante* v. *Swedish American Lines,* 341 F2d 571, 575 (3 Cir. 1964), cert den 379 U.S. 801, the Court stated:

> "Where a ship knows, or should have known, that the stevedore's method of discharging its cargo does not conform to the standard of reasonable care, and thereby creates a hazardous condition, the ship is negligent when it does not forbid the use of the method."

During the evening, a ship's officer watched the discharge operation and saw that there were not enough longshoremen working on the conveyors and that as a result, the men controlling the conveyors had to leave their stations to straighten up the boxes of bananas when they became "hung-up." The ship's officer did not stop the operation or see to it that more longshoremen were assigned to the job. On the basis of this proof, the jury could have found and apparently did find that the shipowner was negligent. This finding should be affirmed.

The jury could also have found the shipowner negligent for not requiring the longshoremen to wear protec-

tive head gear. The Third Circuit Court of Appeals in *Gilchrist* v. *Mitsui Sempaku K.K.*, 405 F2d 763, 765 (3 Cir. 1968), cert den 398 U.S. 920, affirmed a verdict which was partly based upon the claim that the shipowner had failed to require the longshoremen to wear protective head gear.

In *Meyer* v. *United States*, 254 F. Supp. 873 (SDNY 1966) there was a finding of negligence for a failure to enforce a regulation requiring the wearing of protective head gear.

In the instant case it would have been safer practice to require head gear for the men working underneath three levels of conveyors and the failure to require their use was negligence on the part of the shipowner.

POINT III

Plaintiff proved that the vessel was unseaworthy in more than one respect.

A cause of action for unseaworthiness is independent of the claim for negligence and recovery and may be had for an unseaworthy condition even in the absence of negligence. *Mahnich* v. *Southern SS Co.*, supra.

Unseaworthiness is a species of liability without fault and liability may follow from an unseaworthy condition even though the shipowner had no notice of the condition. *Mahnich* v. *Southern SS. Co.*, supra; *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960).

If an unseaworthy condition exists, liability must follow even though the shipowner exercised due care and was diligent, indeed proof of due care or the exercise of diligence is not admissible on the issue of unseaworthiness. *Mahnich* v. *Southern S.S. Co.*, supra.

The duty of furnishing a seaworthy vessel, equipment or appliances is absolute and non-delegable. *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, and is not dependent upon negligence as it is a species of liability without fault. *Le Gate* v. *Paranolga,* 221 F2d 689.

The shipowner is under a continuing duty to furnish a vessel which is seaworthy in all respects and safe to work aboard. *The H.S. Scandrett,* 87 F2d 708, 711; *Mahnich* v. *Southern S.S. Co.,* supra; *Seas Shipping Co.* v. *Sieracki,* supra.

Plaintiff need only show that a vessel is not seaworthy in a particular respect and that the particular unseaworthy condition or combination of unseaworthy conditions was a proximate cause of his injury. *McAllister* v. *Magnolia Petroleum Company,* 357 U.S. 221.

This does not mean that the unseaworthiness need be, although it may be, the sole cause of the accident. It merely means that it must be a factor contributing to the accident causing the injury complained of. *Rogers* v. *Missouri Railroad Company,* 352 U.S. 500.

It is settled law that a vessel becomes unseaworthy and a shipowner liable when defective or inadequate equipment is brought aboard by the longshoremen. *Huff* v. *Matson Navigation Company,* 338 F2d 205, 212, 213 (9 Cir. 1964) cert den. 380 U.S. 943. In this case the longshoremen employees of Bay Ridge brought the conveyors aboard the vessel and operated them during the entire day. Once they started to discharge the larger boxes of bananas, the conveyors were unsafe and inadequate for their intended purpose and the vessel was rendered unseaworthy. The jury agreed with plaintiff's claim when it found the conveyor unseaworthy. See Special Interrogatory #3 (236a).

There was also proof that on each level of the two decks above the lower hold, there was a longshoreman

stationed at the controls which governed the conveyor running to the next level. There was also an additional longshoreman stationed at the point where the two conveyors met in order to guide the boxes around a U-turn. During the evening hours, after 6:00 p.m., there was a continual shortage of longshoremen both at the controls and at the turn and during this period the vessel's officers were in and around the open hatch and they were aware of the use of insufficient personnel, and that boxes were falling from the conveyors. Due to a lack of a longshoreman at the turn of one of the conveyors on "B" deck some of the boxes became jammed resulting in one of the boxes being forced off the conveyor and it fell and struck plaintiff on the head and upper torso. The jury also agreed with this claim when they found the vessel unseaworthy because of the way the conveyor was operated. Finding #5 (236a).

The Supreme Court has held in *Waldron* v. *Moore McCormack Lines, Inc.*, 386 U.S. 724, 727 (1967) that an insufficient number of men assigned to a particular job renders the vessel unseaworthy.

A comparable doctrine has been developed and applied to longshoremen in *Adams* v. *United States,* supra, wherein the Court stated at p. 905:

> "The court found that the system just described rendered the operation unsafe; that with four men on and four men off, in the manner indicated, there were insufficient number of men present to safely do the work. The court held that if prudent and safe practices had been followed whereby all eight men in the gang were available for the stowage, plaintiff would not have had to leave his fork lift operator's seat as there would have been two men

> available to unload the pallet board without having to call on plaintiff to assist.
>
> . . .
>
> Included in the court's conclusions of law was the following: "4. The sole cause of the accident was the plaintiff's own actions in engaging in the 'four on, four off' system of performing work and in leaving the driver's seat of the fork lift truck with a loaded pallet board suspended in the air." Thus the court made it plain that its conclusion was that the accident was caused by the failure to use a sufficient number of longshoremen in the loading process."

In *Adams, supra,* the Court went on to say:

> "The court's findings thus demonstrated a typical case of unseaworthiness. It is well settled that an unsafe method of work creates liability for unseaworthiness. Splosna-Plovba v. Garcia, 9 Cir., Feb. 6, 1968, 390 F.2d 41; Blassingill v. Waterman Steamship Corp., 9 Cir., 336 F.2d 367, 369; Michigan v. Southern S.S. Corp., 321 U.S. 96, 103; and discussion in Gilmore & Black, The Law of Admiralty, § 6-39. Cf. Belships Company, Ltd. v. Bilbao, 9 Cir., Feb. 27, 1968, 390 F.2d 642. It does not appear from the record whether the shipowner had notice of this unsafe method of work but such notice of unseaworthy condition need not be given to the shipowner in order that liability for unseaworthiness may attach. Mitchell v. Trawler Racer Inc., 362 U.S. 539, 549-550, 80 S.Ct. 926, 4 L.Ed.2d 941; Alaska Steamship Co. v. Petterson, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798; Lahde v. Soc. Armadora Del Norte, 9 Cir., 220 F.2d 357, 360;

> Huff v. Matson Navigation Co., 9 Cir., 338 F.2d 205, 215; Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354, and discussion in Black & Gilmore, Law of Admiralty, § 6-44 at 331-332, n. 251."

In this case, the ship's officers had actual knowledge of the unsafe method of work and this fact, added to the unseaworthy condition of the conveyors surely rendered the vessel unseaworthy.

Other Circuit Courts have ruled that an unsafe method of work can create an unseaworthy vessel. In *Price* v. *Yaracuy,* 378 F2d 156 (5 Cir. 1967), the Court stated its views at p. 161:

> "The ship had no duty to actively supervise loading work, but if the ship has knowledge of a condition dangerous to the longshoremen or, in the exercise of ordinary care it would have had such knowledge, it owes them a duty to use reasonable care to prevent injury to them. Gutierrez v. Waterman Steamship Corp., supra; Albanese v. N.V. Nederl. Amerik Stoomv. Maats, 346 F.2d 481 (2d Cir.), rev'd on other grounds, 382 U.S. 283, 86 S. Ct. 429, 15 L.Ed.2d 327 (1965); Misurella v. Isthmian Lines, Ins., 338 F.2d 40 (2d Cir., 1964). For example, a shipowner may be guilty of negligence in failing to forbid an unsafe method of discharging cargo. Ferrante v. Swedish American Lines, 331 F.2d 571 (3rd Cir.) cert. dismissed, 379 U.S. 801, 85 S.Ct. 10, 13 L.Ed.2d 20 (1964); Hroncich v. American President Lines, Ltd., 334 F.2d 282, 286 (3rd Cir., 1964). Obviously the same principle governs unsafe methods of loading. Cf. D/S Ove Skou v. Hebert, 265 F.2d 341 (5th Cir., 1966)."

CONCLUSION

The judgment appealed from should be in all respects affirmed.

Respectfully submitted,

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The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL CASTELLANO

S

OSTKER

AFFIDAVIT OF SERVICE

TE OF NEW YORK,

NTY OF NEW YORK, ss:

AFRIM HASKAJ being duly sworn,

oses and says that he is over the age of 21 years and resides at 1481 42nd St, Bklyn, NY

That on the 21st day of May, 1976 , ~~1975~~

served the annexed brief of ap pal plaintiff - appellee upon

Kirlian Campbell & Keating, attorneys for Bay Ridge Op, Co,
120 Broadway, NY, NY

ichanowicz & Callan, attorneys for Oetker, 80 Broad~~XX~~ street

is action, by delivering to and leaving with said attorneys

~~XXX~~ two ~~XXXX~~ true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons
ioned and described in the said action.

onent is not a party to the action.

rn to before me, this 21st

of May, 1976, ~~1975~~

Afrim Haskaj

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
ommission Expires March 30, 1977

receipt of two(2) copies of
the within BRIEF is
hereby admitted this 21 day
of May, 1976

Attorney for 3RD ARGT. A-APPELLANT

receipt of two(2) copies of
the within
hereby admitted this day
of , 197

Attorney for

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